

The Honorable Michelle L. Peterson

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CITY OF SEATTLE,

Plaintiff,

v.

MONSANTO COMPANY, et al.,

Defendants.

No. 2:16-cv-00107-RAJ-MLP

**PLAINTIFF'S SURREPLY IN
OPPOSITION TO DEFENDANTS'
MOTION TO EXCLUDE PROPOSED
EXPERT TESTIMONY BY DR. LISA
RODENBURG**

NOTE ON MOTION CALENDAR:
August 26, 2022

ORAL ARGUMENT REQUESTED

PL. SURREPLY IN OPPOSITION
TO DEFS.' MOTION EXCLUDE
EXPERT TESTIMONY BY
DR. LISA RODENBURG
(2:16-cv-00107-RAJ-MLP)

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1 Monsanto's reply in support of its motion to exclude the testimony of Dr. Lisa
 2 Rodenburg ("Reply") (Dkt. #419) improperly seeks to introduce new evidence: specifically,
 3 Exhibits A (Dkt. #421-1), B (Dkt. #421-2), and C (Dkt. #421-3) to the Declaration of Lisa N.
 4 DeBord in Support of Defendants' Reply in Support of Motion to Exclude the Expert Testimony
 5 of Lisa Rodenburg ("DeBord Decl.") (Dkt. #421).

6 "It is not acceptable legal practice to present new evidence or new argument in a reply
 7 brief." *United Specialty Ins. Co. v. Shot Shakers, Inc.*, C18-0596JLR, 2019 WL 199645, at *6
 8 (W.D. Wash. Jan. 15, 2019), *aff'd*, 831 Fed. Appx. 346 (9th Cir. 2020) (quoting *Roth v. BASF*
 9 *Corp.*, C07-0106MJP, 2008 WL 2148803, at *3 (W.D. Wash. May 21, 2008)). "[W]here new
 10 evidence is presented in a reply ..., the district court should not consider the new evidence
 11 without giving the [non-]movant an opportunity to respond." *Provenz v. Miller*, 102 F.3d 1478,
 12 1483 (9th Cir. 1996) (quoting *Black v. TIC Inv. Corp.*, 900 F.2d 112, 116 (7th Cir.1990)).

13 Courts in this District routinely strike new evidence presented in a reply. *E.g.*,
 14 *Houserman v. Comtech Telecomm. Corp.*, 509 F. Supp. 3d 1301, 1303 (W.D. Wash. 2020)
 15 ("Defendants' submission of Mr. Goolsby's testimony for the first time in their reply is
 16 improper.") (citing *Provenz v. Miller*, 102 F.3d at 1483); *Bridgham-Morrison v. Nat'l Gen.*
 17 *Assurance Co.*, C15-0927RAJ, 2015 WL 12712762, at *2 (W.D. Wash. Nov. 16, 2015) ("For
 18 obvious reasons, new arguments and evidence presented for the first time on Reply ... are
 19 generally waived or ignored."). Indeed, a "request to strike certain materials in the reply brief is
 20 an appropriate, indeed the only, basis for filing a sur-reply." *Farnes v. Metro. Grp. Prop. & Cas.*
 21 *Ins. Co.*, 2:18-CV-1882-BJR, 2019 WL 4044102, at *1 (W.D. Wash. July 31, 2019).

22 The City challenges three of the four exhibits Monsanto submitted with its reply. Those
 23 exhibits are: (1) an undated PowerPoint presentation prepared by Dr. Rodenburg titled
 24 *Identifying PCB sources through fingerprinting*, see DeBord Decl. (Dkt. #421), at ¶ 2 and Ex. A
 25 (Dkt. #421-1); (2) a PowerPoint presentation prepared by Dr. Rodenburg dated June 19, 2013,
 26 and titled *PCBs in pigments, inks and dyes: Documenting the problem*, see DeBord Decl. (Dkt.

#421), at ¶ 3 and Ex. B (Dkt. #421-2); and (3) a transcript of a webinar given by Dr. Rodenburg on September 25, 2017, *see* DeBord Decl. (Dkt. #421), at ¶ 3 and Ex. C (Dkt. #421-3). Each of these exhibits has been in Monsanto’s possession for years. *See* DeBord Decl. (Dkt. #421), at ¶¶ 2–4 (identifying Exhibits A, B, and C each as an exhibit to a deposition of Dr. Rodenburg taken on February 7, 2018, in the *City of Hartford, et al. v. Monsanto Company, et al.*). The exhibits do not rebut arguments raised by Plaintiff City of Seattle (the “City”) in its opposition to Defendants’ motion to exclude. Rather, Monsanto cites these exhibits in further support of its contention that Dr. Rodenburg has expressed opinions about “the ubiquitous presence of byproduct PCBs.” Reply (Dkt #419), at 1; *see also id.* at 4. Monsanto made the same argument in its motion. *See* Defendants’ Daubert Motion to Exclude Testimony of Lisa Rodenburg (“Motion”) (Dkt #320), at 1–2.

Monsanto has no excuse for failing to submit evidence it contends is relevant to the arguments made in its motion to exclude the testimony of Dr. Lisa Rodenburg when it first filed its motion, thereby depriving the City of the opportunity to respond. The Court should not allow Monsanto to sandbag the City by submitting new evidence with its reply and should strike the exhibits in question.

Even if the Court were inclined to consider Monsanto’s new evidence, none of the three documents undermine the reliability of the data Dr. Rodenburg relied on or reliability of the methodology she employed to reach the opinions expressed in her report in this matter. Nor do the exhibits reflect any discrepancy between the opinions Dr. Rodenburg offers in this case statements she has made outside of the litigation. While Monsanto falsely suggests that Dr. Rodenburg has stated that byproduct PCBs are “the ‘main problem’ facing municipalities like the City of Seattle,” Dr. Rodenburg in fact stated that byproduct PCBs are a particular problem for Spokane County. Reply (Dkt #419), at 4. Significantly, immediately after her comment about Spokane County, Dr. Rodenburg stated that, in “some of these places, like, especially, like the Green-Duwamish River, you see that you've got the green, the blue, and the

1 purple bars. Those are all Aroclors. So the Green-Duwamish River *is totally contaminated by*
 2 *Aroclors.*” DeBord Decl., Ex. C (Dkt #421-3), at 53:20–54:1 (emphasis added). Further,
 3 Dr. Rodenburg’s observation that PCB congeners that may be associated with byproduct PCBs
 4 have been found in a number of locations and that byproduct PCBs have been found—by Dr.
 5 Rodenburg herself—to be a significant source of PCBs in a very small number of cases, does
 6 not undermine her conclusion in this case that Monsanto’s PCBs are the source of the vast
 7 majority of PCB contamination in the Lower Duwamish Waterway. *See* DeBord Decl., Ex. A
 8 (Dkt #421-1), at 17–40.

9 Because Monsanto could and should have submitted the challenged exhibits with its
 10 motion, rather than waiting to submit them with its reply, the exhibits should be struck. But,
 11 even if they are not struck, the new evidence Monsanto submitted with its reply fails to support
 12 its motion to exclude Dr. Rodenburg’s testimony.

13 I. CONCLUSION

14 For the foregoing reasons, Plaintiff City of Seattle respectfully requests that the Court
 15 strike Exhibits A (Dkt #421-1), B (Dkt #421-2), and C (Dkt #421-3) to the Declaration of Lisa
 16 N. DeBord (“DeBord Decl.”) (Dkt #421).

1 DATED this 31st day of August, 2022.

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